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San Jose

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STEVE TRACHSEL, an individual, SUN CITY
TOWERS, LLC, a California limited liability
company, THOMAS CIRrito, an individual,
ATOCHA LAND, LLC, a Delaware limited
liability company, MICHAEL CIRrito, an
individual, and CIRrito HOLDINGS, LLC, a
Delaware limited liability company

UNITED STATES DISTRICT COURT - NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

STEVE TRACHSEL, an individual; SUN
CITY TOWERS, LLC, a California limited
liability company; THOMAS CIRrito, an
individual; ATOCHA LAND, LLC, a
Delaware limited liability company;
MICHAEL CIRrito, an individual; and
CIRrito HOLDINGS, LLC, a Delaware
limited liability company,

Plaintiffs,

v.

RONALD BUCHHOLZ; CHARICE
FISCHER; RDB DEVELOPMENT, LLC, a
Nevada limited liability company;
SOLOMON CAPITAL, INC., a Nevada
corporation; JONATHON VENTO; GRACE
CAPITAL, LLC, dba GRACE
COMMUNITIES, an Arizona limited liability
company; DONALD ZELEZNAK;
Z-LOFTS, LLC, an Arizona limited liability
company; ZELEZNAK PROPERTY
MANAGEMENT, LLC dba KELLER
WILLIAMS REALTY, an Arizona limited
liability company; KELLER WILLIAMS
REALTY, INC., a Texas corporation; and
DOES 1-50, inclusive,

Defendants.

CASE NO: C08 02248RMW

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR
ADMINISTRATIVE RELIEF – LEAVE
TO FILE LATE REPLY BRIEF**

Date: listed as August 21, 2008
Time: 9:00 a.m.
Ctrm: 6
Judge: Hon. Ronald M. Whyte

Pursuant to Local Rule 7-11(b), Plaintiffs Steve Trachsel, Sun City Towers, LLC, Thomas Cirrito, Atocha Land, LLC, Michael Cirrito, and Cirrito Holdings, LLC submit the following Opposition to Defendants' improperly noticed Motion for Administrative Relief – Leave to File Late Reply Brief:

A. The Court Has Already Denied Defendants the Requested Relief

In its August 6, 2008 Order rescheduling Defendants' Motion to Dismiss hearing (attached to Defendants' Motion for Relief as Exhibit "A"), the Court clearly states that Defendants are no longer permitted to file a reply brief to their motion to dismiss. In that Order, the Court stated as follows:

[U]nless otherwise stipulated by the parties or ordered by the court, defendants Jonathon Vento, Grace Capital, LLC, Donald Zeleznak, Z-Lofts, LLC, and Zeleznak Property Management, LLC ***shall not be permitted to file a reply brief on their motion to dismiss***, as the time for doing so on the previously-noticed schedule has now passed. (Notice of Continuance, 2:3-6 [Emphasis added.])

The Court has already decided this issue and has no need to decide it again. Accordingly, the Court should abide by its prior order prohibiting Defendants from filing a late reply brief on their motion to dismiss.

B. The Requested Relief is Prejudicial to Defendants

Defendants' requested relief would put Plaintiffs at a procedural disadvantage because Defendants had the opportunity to benefit from the arguments raised by Keller Williams in their motion to dismiss. The Keller Williams motion to dismiss was filed after the Defendants' reply was due. By filing their reply three weeks after it was actually due and two weeks after their motion was set to be heard, Defendants benefited from the additional arguments raised in the action during that time, and particularly the arguments raised in the Keller Williams motion to dismiss.

Recognizing the prejudice to Plaintiffs by their ability to review Keller Williams' motion, Defendants attempt to anticipate this argument by stating in their declaration that Keller Williams' reply brief would not be due until the next day. However, Keller Williams actually filed its reply brief before Defendants filed the aforementioned motion, so Defendants had the

1 opportunity to review the motion, opposition, and reply on the Keller Williams motion before
2 filing its own reply. Despite Defendants' assurances to the contrary, Plaintiffs would be
3 prejudiced by this filing and the Court should not accept it.

4 **C. Defendants Knew or Should Have Known That Their Reply Brief Was Due**

5 Regardless of whether electronic malfunctions prevented Defendants from receiving
6 Plaintiffs' opposition, Defendants should have known that an opposition to their motion to
7 dismiss was due on July 18. Based on the statement in the Declaration supporting Defendants'
8 motion, counsel's electronic server problems lasted from July 7 through July 28, a period of three
9 weeks during which ten other documents were filed with the Court in this matter, including
10 Plaintiff's opposition.

11 Based on counsel's alleged failure to receive these pleadings, and particularly the alleged
12 failure to receive Plaintiff's opposition, counsel should have visited the ECF website docket,
13 contacted the Court, or contacted opposing counsel to request any extension before the date to file
14 the reply had passed. Instead, Defendants did nothing and allowed the time for the reply to lapse.

15 Further, Defendants claim to have discovered their error on July 28, when they did what
16 they should have done two weeks earlier by requesting a copy of the opposition, which Plaintiffs
17 promptly provided. From that date, it was four weeks until August 21, when Defendants filed the
18 instant motion. The proposed reply, which was attached to the declaration accompanying said
19 motion, was also dated August 21. Assuming *arguendo* that Defendants' first receipt of the
20 opposition was on July 28, Defendants had a month to draft their reply. This is further evidence
21 of prejudicial effect on Plaintiffs by this filing. Thus, the Court should not accept this prejudicial
22 filing over a month after it was due.

23 **D. Conclusion**

24 Defendants requested relief has already been prohibited by the Court. In addition, it is
25 prejudicial to Plaintiffs based on both the amount of time taken to file the reply (over a month)
26 and the benefit of reviewing several additional filings during that time. Finally, Defendants knew
27 or should have known that the opposition was due to be filed, but did not take action until two
28 weeks later, after the reply was due. For the foregoing reasons, Plaintiffs respectfully request that

1 the Court deny Defendants' Motion for Administrative Relief – Leave to File Late Reply Brief.

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3 Dated: August 26, 2008

ROPER, MAJESKI, KOHN & BENTLEY

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5 By: 

TODD A. ROBERTS

JESSHILL E. LOVE

Attorneys for Plaintiffs

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